

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

Docket No. 163,798

## ORDER

Review was initially sought by claimant and the Kansas Workers Compensation Fund of the Award of Special Administrative Law Judge William F. Morrissey, entered in this proceeding on January 19, 1994. Thereafter, the claimant settled her claim, leaving only the respondent, its insurance carrier and the Workers Compensation Fund as the remaining parties to this appeal.

## APPEARANCES

The respondent and its insurance carrier appeared by and through their attorney, Vaughn Burkholder of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Matthew L. Bretz of Hutchinson, Kansas.

## RECORD

The record considered by the Appeals Board is enumerated in the Award of the Special Administrative Law Judge, with the addition of the transcript of the Settlement Hearing held March 17, 1994 before Special Administrative Law Judge David J. Wood.

## STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review, with the added stipulations at oral argument as to the nature and extent of claimant's disability and that the record should include the transcript of the March 17, 1994 Settlement Hearing.

### **ISSUES**

The Administrative Law Judge granted respondent's request to assess twenty-five percent (25%) liability against the Kansas Workers Compensation Fund. The Kansas Workers Compensation Fund should not be responsible for benefits due claimant as a result of an alleged second back injury claimant sustained on August 28, 1991 while attempting to return to work following an August 6, 1991 back injury. The sole issue now before the Appeals Board is liability of the Kansas Workers Compensation Fund.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

The facts are uncontroverted. Claimant injured her back at work on August 6, 1991 and subsequently was released to return to work by the authorized treating physician. On August 28, 1991, claimant's first day back, she suffered an aggravation of her condition which the Appeals Board finds to have been permanent aggravation of the first and, hence, a new injury. Lawrence Blaty, M.D. found claimant to have sustained a combined four percent (4%) permanent impairment of function as a result of the two injuries and apportioned three percent (3%) to the first accident and one percent (1%) to the second.

The purpose of the Kansas Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. *Morgan v. Inter-Collegiate Press*, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); *Blevins v. Buildex, Inc.*, 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides:

"'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

....

"15. Loss of or partial loss of the use of any member of the body;

"16. Any physical deformity or abnormality;

"17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. See K.S.A. 1991 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting disability or death was contributed to by the preexisting impairment. See K.S.A. 1991 Supp. 44-567(a)(2).

In either situation, it is the employer's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1991 Supp. 44-567(b) provides:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

An employee, previously injured or handicapped, is not required to exhibit continued disability or to be unable to return to his former job in order to be a "handicapped" employee. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 405, 701 P.2d 336 (1985). Further, mental reservation on the part of the employer is not required. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), *Aff'd* 242 Kan 430, 748 P.2d 420 (1988).

The provisions imposing liability upon the Kansas Workers Compensation Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan v. Inter-Collegiate Press, *supra*.

As indicated above, the Legislature created the Workers Compensation Fund for the basic and primary purpose of encouraging the employment of impaired individuals. Assessing liability against the Fund in situations where that primary purpose is not furthered is improper.

In the case now before us, the Workers Compensation Fund argues that the uncontroverted opinion of Dr. Blaty should be rejected and respondent found not to have carried its burden of proof due to the physician's admission that his apportionment was speculative and not based upon a reasonable degree of medical probability.

K.S.A. 1991 Supp. 44-567(a)(2) provides that liability of the Workers Compensation Fund shall be determined " . . . in a manner which is equitable and reasonable . . . ." It does not prescribe the requisite evidence the trier of fact must follow. Expert testimony

from a physician is certainly helpful but it is not necessarily required, nor is it always to take a certain form.

Here Dr. Blaty felt comfortable giving an opinion to the effect that claimant sustained two accidents and apportioning his functional impairment rating between the two accidents. The fact that he was candid in admitting that his apportionment was somewhat speculative, it was nonetheless his clinical judgment. The Appeals Board finds Dr. Blaty's testimony to be helpful on the issue of Fund liability, as did the Special Administrative Law Judge. Based upon the record as a whole, the Appeals Board finds that liability for the cost of the settlement award for the accidents of August 6 and August 28, 1991 should be apportioned seventy-five percent (75%) against the respondent and its insurance carrier and twenty-five percent (25%) against the Workers Compensation Fund.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated January 19, 1994, as modified by the settlement agreed award entered March 17, 1994 by Special Administrative Law Judge David J. Wood, should be, and hereby is, affirmed in all respects.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Vaughn Burkholder, Wichita, KS  
Matthew L. Bretz, Hutchinson, KS  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director